

Docket No. CV-11-0091-CQ

IN THE SUPREME COURT OF ARIZONA

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JULIA VASQUEZ,
Plaintiff,

v.

SAXON MORTGAGE, INC., SAXON MORTGAGE SERVICES, INC., AND
DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR
SAXON ASSET SECURITIES TRUST 2005-3,
Defendants.

On Discretionary Review of the Questions Certified by the
United States Bankruptcy Court for the District of Arizona
(Case No. 4:08-bk-15510-EWH)

**BRIEF OF AMICI CURIAE ARIZONA BANKERS ASSOCIATION AND
THE GREATER PHOENIX CHAMBER OF COMMERCE**

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STATEMENT OF INTEREST

The Arizona Bankers Association (the "Association") is a non-profit Arizona corporation which has represented the interests of Arizona's banking industry for over 100 years. The Association counts over 50 banks and credit card operations among its members. The issues presented in this case are of immense importance to the Association and its members. Those issues could affect tens of thousands of transactions previously entered into by the Association's members and could also affect those members' access to and cost of capital.

The Greater Phoenix Chamber of Commerce (the "Phoenix Chamber") is a non-profit Arizona corporation established in 1888 to represent the interests of businesses located in the greater Phoenix metropolitan area. The Phoenix Chamber counts 2,600 businesses among its members. Many of the Phoenix Chamber's members have entered into or extended commercial loans secured by real property or entered into commercial leases, all of which could be adversely affected by the Court's decision in this matter. Moreover, the Phoenix Chamber's members have an interest in minimizing borrowing costs and maximizing the availability of funding to businesses and consumers alike. Lastly, the Phoenix Chamber's members have a strong interest in promoting commerce, an interest that is directly implicated in this case.

QUESTIONS CERTIFIED

1. Is the recording of an assignment of deed of trust required prior to the filing of a notice of trustee's sale under A.R.S. § 33-808 when the assignee holds a promissory note payable to bearer?
2. Must the beneficiary of a deed of trust being foreclosed pursuant to A.R.S. § 33-807 have the right to enforce the secured obligation?

INTRODUCTION

This case is about the steps necessary to become a "beneficiary" under a deed of trust following assignment of a loan secured by real property. Appellant, Julia V. Vasquez ("Vasquez"), requests that the Court adopt a rule that in order to be a "beneficiary" one must have possession of the note *and* record an assignment of the deed of trust prior to the recording of a notice of trustee's sale. Contrary to Appellant's proposed rule, however, Arizona law does not require the owner of a note to record an assignment in order to become the beneficiary under a deed of trust; all that is required is ownership of the note, in which case the beneficial interest under the deed of trust is deemed to automatically follow. In fact, Arizona law does not even require a formal written assignment of the deed of trust, let alone require that an assignment be recorded. Because Appellee Deutsche Bank National Trust Company, as Trustee for Saxon Asset Securities Trust 2005-3 ("Deutsche Bank") was in possession, and therefore the owner, of Vasquez's note

at the time the notice of trustee's sale was recorded, it was also the "beneficiary" under the deed of trust and entitled to initiate trustee's sale proceedings. *See* A.R.S. §§ 33-801(1), 33-807(A).

The rule proposed by Vasquez would effectively re-write Arizona law with respect to deeds of trust and the transfer of obligations secured by deeds of trust – not to mention Articles Three and Nine of the Uniform Commercial Code ("UCC"). Vasquez's proposed rule also would have an extraordinarily negative impact on the residential and commercial real estate markets in Arizona (and, potentially, elsewhere). Vasquez's proposed rule is inconsistent with banking industry practice over many years, which is based on a reasonable (and correct) interpretation of Arizona law. That law has never required those who purchase secured obligations to record an assignment of deed of trust prior to initiating trustee's sale proceedings. Tens of thousands of trustee's sales have occurred in the absence of recorded assignments. A ruling by this Court accepting Vasquez's proposed rule would place the legal status of those trustee's sales in doubt. Moreover, residential properties sold at trustee's sales are later purchased by consumers who obtain loans from financial institutions in order to pay the purchase price – which loans are then secured by the properties. Any ruling that undermined the validity of the trustee's sales could also result in undermining the security for these loans, putting both the consumer and the lender at risk.

Moreover, real estate lenders require a constant source of new capital to make new loans. Consequently, lenders have for many years sold their loans to investors and other third parties on the secondary market, which provides these lenders with new capital to make new loans. Requiring those who originate or purchase loans to execute and record assignments of deeds of trust prior to foreclosure would greatly increase the expense and administrative burden connected with secondary market transactions, thereby decreasing the secondary market's utility and further restricting the availability of real estate loans.

ARGUMENT

I. Arizona Law Does Not Require Recordation Of An Assignment Of Deed Of Trust Prior To Recording A Notice Of Trustee's Sale.

Saxon Mortgage, Inc. ("Saxon") assigned its interest in Vasquez's promissory note to Deutsche Bank by indorsing the note in blank without recourse and transferring possession to Deutsche Bank. That transaction is governed by Article Three of the UCC, which requires only possession in order to enforce a promissory note indorsed in blank. As the party entitled to enforce the note through possession, Deutsche Bank was Saxon's successor in interest and, therefore, was the beneficiary under the deed of trust. While Deutsche Bank had the option at that point to create and record an assignment of the deed of trust, Deutsche Bank was not required to do so.

A. Arizona's Deed Of Trust And Recording Statutes Do Not Require The Assignee Of A Promissory Note To Record An Assignment Of A Deed Of Trust.

Vasquez incorrectly answers certified question number one in the affirmative. Her argument is that "Arizona's recording laws establish a framework requiring that all transfers of real estate, or any interest therein, be recorded within sixty days of such transfer." (Vasquez Br. at 3). Vasquez then argues that because Deutsche Bank did not record an assignment of deed of trust before the notice of trustee's sale was recorded, Deutsche Bank was not a "beneficiary" under the deed of trust and did not have the power to initiate trustee's sale proceedings. (*Id.* at 5).

This argument fails because it is premised on an incorrect assumption – namely, that Arizona's recording laws were triggered when Saxon indorsed Vasquez's promissory note in blank and Deutsche Bank took possession of it. *The transfer of ownership of Vasquez's note was not a transfer of an "interest" in real estate.*¹ Saxon's indorsement of the promissory note and delivery of the promissory note to Deutsche Bank was a negotiation of the promissory note to Deutsche Bank. The act of negotiation is not a transfer of an interest in real estate; negotiating a promissory note (which is a right to a future stream of payments) is

¹ By operation of Arizona law, the deed of trust "followed" the note, meaning that Deutsche Bank became the beneficiary of the deed of trust once Saxon indorsed the note and Deutsche Bank took possession.

fundamentally different than directly transferring the real property that secures that future stream of payments.

Because Saxon's negotiation of the promissory note was not a transfer of an interest in real property, Arizona's recording statutes did not apply to that transaction. Instead, that transaction was governed by Article Three of the UCC. "[A] promissory note, as a negotiable instrument, falls within the provisions of Article 3 of the Uniform Commercial Code." *Gainok v. Featherston*, 131 Ariz. 421, 422, 641 P.2d 909, 910 (App. 1982). Arizona's version of Article Three provides that "[w]hen indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." *See* A.R.S. § 47-3205(B). When Saxon indorsed the note in blank and handed it over to Deutsche Bank, the act of negotiation was complete; at that point, Deutsche Bank became "the holder of the instrument" and the party entitled to enforce it. *See* A.R.S. § 47-3301.

Although not specifically the case here, there are also instances where Article Nine of the UCC will govern the question of who is the "owner" of a promissory note. For example, if Deutsche Bank had loaned money to Saxon in return for Saxon pledging Vasquez's note as collateral for that loan, Article Nine would apply. In UCC parlance, Vasquez's promissory note in that circumstance would be considered "realty paper." In that circumstance, Article Nine also would

not require that Deutsche Bank record the transfer of Saxon's promissory note. Under Arizona law, a mortgage note and the debt evidenced thereby are personal property. *See Hill v. Favour*, 52 Ariz. 561, 570-71, 836 P.2d 434 (1938) ("The note and the debt evidenced thereby are personal property . . ."). More particularly, a mortgage note and the debt evidenced thereby constitute "a security interest in collateral in the form of an instrument or negotiable document." *See Rodney v. Arizona Bank*, 172 Ariz. 221, 225, 836 P.2d 434, 438 (1938). Arizona's version of Article Nine provides that "a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money or tangible chattel paper *by taking possession of the collateral.*" *See* A.R.S. § 47-9313(A) (emphasis added). Accordingly, under Article Nine, Deutsche Bank would own, and simultaneously perfect, an interest in Vasquez's note (*i.e.*, the realty paper) when it took possession of the note; no recording or filing would be required.

Based on the foregoing, the Court should reject Vasquez's request that the Court add an additional recording requirement to Articles Three and Nine of the UCC. Arizona's deed of trust statutes clearly provide that once Deutsche Bank took possession of the note, Deutsche Bank also became the "beneficiary" under the deed of trust. *See* A.R.S. § 33-801(1) ("the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, *or*

the person's successor in interest") (emphasis added).² Most importantly, however, Arizona courts have long held that "[a]n assignment of the note carries the mortgage with it." *See Hill*, 52 Ariz. at 569. And the Arizona legislature memorialized that common law principle in the deed of trust statutes: "The transfer of any contract or contracts secured by a trust deed shall operate as a transfer of the security for such contract or contracts." A.R.S. § 33-817. Accordingly, when Deutsche Bank completed the transfer of Vasquez's note by taking possession thereof, the deed of trust also transferred to Deutsche Bank by operation of law. At that point, Deutsche Bank, as Saxon's successor in interest, became the "beneficiary" under Vasquez's deed of trust and under Arizona law was the party entitled to exercise the power of sale.³ *See* A.R.S. § 33-807(A) ("At the option of the *beneficiary*, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property . . .") (emphasis added).

Section 33-817 does not even require the creation of a formal document assigning the deed of trust, let alone recordation of that document. All that is required is a transfer of the note. Moreover, no other provision in either the mortgage or deed of trust statutes *requires* recordation of an assignment of deed of

² Vasquez claims that only "the beneficiary or the beneficiary's successor in interest as recorded in the land records can command the trustee to act upon the trustee's power of sale." (Vasquez Br. at 5). The "as recorded in the land records" portion of that statement appears nowhere in the statute.

³ The same analysis would apply under Article Nine of the UCC.

trust in order to become a "beneficiary." Arizona's mortgage statute provides that "[a]n assignment of a mortgage *may* be recorded in like manner as a mortgage." A.R.S. § 33-706 (emphasis added). Had the Legislature intended to require recordation, it would have used the term "must," not "may," and it would not have provided in A.R.S. § 33-817 for the transfer of a deed of trust by operation of law upon the transfer of a note. Moreover, the deed of trust statute, similar to the mortgage statute, merely states that an "assignment of a beneficial interest under a trust deed . . . shall from the time of being recorded impart notice of the content to all persons" See A.R.S. § 33-818. This language means that *if* one records an assignment of a deed of trust, such recordation constitutes constructive notice to the world, but § 33-818 nowhere requires such recordation in order to become a "beneficiary" under A.R.S. § 33-801(1). See *Wead v. Lutz*, 831 N.E.2d 482, 486 (Ohio Ct. App. 2005) ("[T]he issue of when the mortgage assignment was recorded becomes relevant only to the extent of establishing creditor priority and subsequent notice to a bona fide purchaser of the land. The validity of the mortgage itself remains unaffected by the timing of the assignment's recordation"). Clearly, providing an *option* to record an assignment of a deed of trust is far different from *requiring* recordation of such an assignment.

In sum, the answer to certified question number one is "No." According to Arizona's version of the UCC, Deutsche Bank became Saxon's successor in interest

and was entitled to enforce Vasquez's promissory note when Deutsche Bank obtained possession of the note indorsed in blank; no recordation was necessary. Pursuant to A.R.S. § 33-817, the valid transfer of Vasquez's note automatically operated as a transfer of beneficial interest under the deed of trust securing Vasquez's note. As Saxon's successor in interest, Deutsche Bank was the beneficiary under the deed of trust. While Deutsche Bank certainly had the option to create and record a formal assignment, it was not required to do so in order to exercise its rights as beneficiary, including the right to initiate a trustee's sale proceeding as a result of Vasquez's default under the promissory note.

B. Prior Case Law Supports That Recordation Of An Assignment Is Not Required In Order To Be The "Beneficiary" Of A Deed Of Trust.

Prior case law from both Arizona and elsewhere supports that recordation of an assignment of deed of trust is not required prior to exercising the power of sale in a deed of trust. In Arizona, *Rodney v. Arizona Bank*, a case involving realty paper, is one such case. *See* 172 Ariz. at 223, 836 P.2d at 436. In *Rodney*, the Vasquezes (no relation to Plaintiff in this case) purchased real property from Hal Clonts ("Clonts") by giving Clonts a \$25,000 promissory note secured by a deed of trust, which Clonts caused to be recorded. *See id.* at 222, 836 P.2d at 435. The Vasquezes paid the amounts due under the note to an escrow company. *See id.* Later, Clonts transferred his interest in the note and deed of trust to the Fiddlers

through a document entitled Assignment of Beneficial Interest in Deed of Trust. *See id.*

The Fiddlers thereafter executed a document in favor of Security Pacific Bank Arizona ("Security Pacific") assigning to Security Pacific "all monies now due and payable, or hereafter to become due and payable" on the Vasquezes' promissory note. *See id.* Security Pacific did not file or record any document evidencing the assignment. *See id.* Instead, Security Pacific simply informed the escrow company of its interest in the note. *See id.*

Unfortunately for Security Pacific, the Fiddlers were not done transferring their interest in the Vasquezes' promissory note: five months after assigning it to Security Pacific, the Fiddlers again transferred their interest in the note and deed of trust, this time to Theron Rodney ("Rodney"), in return for \$20,000. *See id.* Rodney recorded an assignment in the Mohave County Recorder's office and made demand on the title company to remit the Vasquezes' payments to him. *See id.*

Upon receiving competing demands for the proceeds from the note, the title company filed an interpleader action. *See id.* The trial court found in favor of Rodney, ruling that he was the owner of the note and deed of trust. *See id.* at 223, 836 P.2d at 436. On appeal, the Arizona Court of Appeals framed the issue presented as follows: "Does Article Nine of the UCC or [Arizona's recording statute] apply to *creation* and perfection of a security interest in a promissory note,

when the note itself is secured by a deed of trust on real property?" *See id.* (emphasis added).

The court answered that question as follows: "We hold that Article Nine of Arizona's Commercial Code applies to creation and perfection of a security interest in a promissory note, when the note itself is secured by a deed of trust in real property." *See id.* at 225, 836 P.2d at 438. In so holding, the court explained that Article Nine's application was not "negated by the arrangement that the note proceeds also serve as the source of the funds for repayment of the loan." *See id.* at 224, 836 P.2d at 437. Because Security Pacific was the first to have *possession* of the Vasquezes' note, it was also the first to have *ownership* of the note and was entitled to the proceeds thereof despite its lack of recordation. *See id.* at 226, 836 P.2d at 439. Thus, recordation of an assignment was relevant only to perfection of an interest in the deed of trust, not to the identity of the beneficiary: "In light of [the principle that the deed of trust follows the note], we find that Security Pacific received *a corollary security interest in the real property, evidenced by the deed of trust, along with its interest in the note*, although the corollary interest remained unperfected." *See id.* at 223, 836 P.2d at 436 (emphasis added).

Although not factually identical to this case (this case does not involve realty paper or dueling assignees), *Rodney* reaffirms the vitality of the proposition that Deutsche Bank became the "beneficiary" in Vasquez's deed of trust when it took

possession of that note indorsed in blank. Deutsche Bank and Saxon were not *required* to create, and Deutsche Bank was not *required* to record, a formal document memorializing the assignment. Instead, Deutsche Bank became the holder of, and the party entitled to enforce, the promissory note when it took possession of the note.

Vasquez makes much of the *Rodney* court's comment that its "holding . . . poses no conflict with the rule that A.R.S. § 33-411 governs perfection of a security interest in real property, as evidenced by a deed of trust." (Vasquez Br. at 9). Vasquez claims that "[t]he Court of Appeals clearly recognized the distinction between perfecting an interest in commercial paper under the UCC and perfecting an interest in realty under Arizona's recording statutes." (*Id.*). Although it is technically true that the Court recognized that distinction, that fact does not help Vasquez's case. Indeed, the *Rodney* court's "recognition" further supports that Deutsche Bank is the holder of Vasquez's note and that the recording statutes have no effect on, and therefore pose no conflict with, Deutsche Bank's concomitant status as beneficiary under the deed of trust pursuant to A.R.S. § 33-817, regardless of whether Deutsche Bank took additional steps to perfect its interest.

In re Stockbridge Funding Corp., 145 B.R. 797 (Bankr. S.D.N.Y. 1992), a bankruptcy decision from the Southern District of New York also involving realty paper, further supports that a recorded assignment of deed of trust need not occur

prior to the recording of a notice of trustee's sale. In that case, the bankruptcy trustee claimed that a creditor's law firm (the "law firm") violated a bankruptcy stay by recording assignments of mortgages postpetition, and the trustee requested sanctions. *See id.* at 803. The law firm argued that sanctions were inappropriate because recording the assignments was unnecessary and therefore did not advance the creditor's interests. *See id.* at 807.

Although the bankruptcy court ultimately assessed sanctions, it agreed that recording the assignments was unnecessary prior to noticing a trustee's sale. *See id.* at 811. The court began with the propositions that "Article 9 governs perfection of a security interest in a note" and that "[t]o perfect an interest in a mortgage assignment, the assignee must take possession of the note." *See id.* at 808. Moreover, the assignee, once in possession of the note, need take no action whatsoever with respect to the mortgage (or deed of trust): "[T]he assignee is not required to file the assignment in the real estate records nor take any action with respect to the mortgage to perfect." *See id.* at 809. Thus, New York's recording statute "does not apply when the mortgagee assigns his rights to realty paper." *See id.* In fact, the court expressly held that "[u]nder New York law, *the assignee of the mortgage and note may foreclose on the property, regardless of whether the mortgage has been recorded.*" *See id.* at 809 n.27 (emphasis added). The court concluded, therefore, that "in the absence of a statute expressly requiring the

delivery of the mortgage to the assignee or recordation of a mortgage assignment, we conclude that perfection and priority of a security interest in the note (by taking possession under Article 9) should carry over to the mortgage incidental to it." *See id.* at 810. The *Stockbridge* court's analysis under New York law is equally applicable in this case.

II. If The Court Answers Certified Question One "No," It Need Not Address Certified Question Two; However, If The Court Answers Question One "Yes," Then It Should Answer Question Two "No."

If the Court answers certified question one "no" (as undersigned *amici* suggest), then it need not answer certified question number two. That is because, by operation of Arizona law, the beneficiary of a deed of trust will always be the party entitled to enforce the secured obligation. At the very least, that will be the case here, where Deutsche Bank will be both the party in possession of the note (and therefore entitled to enforce it) and the beneficiary of the deed of trust.

If, however, the Court answers certified question one "yes" – thereby requiring that a formal written assignment be recorded before the recording of a notice of trustee's sale – that ruling may create a situation where the beneficiary under the deed of trust is *different* than the party entitled to enforce the secured obligation (*i.e.*, the note).⁴ Although that is likely not the case here – because an

⁴ For example, Vasquez likely will argue in the bankruptcy court that Deutsche Bank may not re-record its notice of trustee's sale without violating the bankruptcy stay.

assignment of deed of trust has been recorded – in cases where a formal assignment of a deed of trust has not been recorded, the assignee of a promissory note would be entitled to enforce the note through mere possession, but that assignee would not be considered the beneficiary under the deed of trust (and therefore not entitled to initiate a trustee's sale) until recordation.

Obviously, the fact that answering certified question one "yes" will create a situation where a mortgage note can be split from the deed of trust – contrary to Arizona law – is just another reason to answer that first question in the negative. An affirmative answer to that question would be inconsistent with decades (perhaps centuries) of law holding that a promissory note and the mortgage (or deed of trust) cannot be split; when a note is transferred, the mortgage follows, and the transfer of a mortgage without the note *is a nullity*. See A.R.S. § 33-817; *Hill*, 52 Ariz. at 568-69 ("The mortgage goes with the note. If the latter is transferred or assigned, the mortgage automatically goes along with the assignment or transfer. . . . A mortgage, as distinct from the debt it secures, is not a thing of value nor a fit subject of transfer; hence an assignment of the mortgage alone, without the debt, is nugatory, and confers no rights whatever upon the assignee").

Nonetheless, if the Court answers question one in the affirmative, it should answer question two in the negative, thereby allowing the beneficiary of a deed of trust to foreclose under A.R.S. § 33-807 even if the beneficiary no longer has the

right to enforce the secured obligation. This ruling would eliminate the possibility of a situation where, despite the borrower defaulting on the loan, no one has the right to foreclose (*i.e.*, because possession of the note has changed hands but no formal recordation of an assignment of deed of trust has occurred). In Massachusetts, where (unlike in Arizona) the mortgage does *not* automatically follow the note, a beneficiary of a deed of trust *can* foreclose without the right to enforce the secured obligation; in this manner, Massachusetts has avoided creating the Catch-22 scenario outlined above. *See In re Marron*, --- B.R. ---, 2011 WL 2600543, at *4 (Bankr. D. Mass. June 29, 2011) (explaining that "Massachusetts, unlike many other states, does not subscribe to the theory that the mortgage follows the note" and therefore "Massachusetts law allows a mortgagee with no interest in the underlying obligation to foreclose").

Moreover, allowing the beneficiary of the deed of trust to foreclose despite not being the party entitled to enforce the secured obligation would not be inconsistent with Arizona's deed of trust statutes. Those statutes define a "beneficiary" of a deed of trust, which is the party entitled to exercise the power of sale, as the party named in the deed of trust or its successor in interest. *See* A.R.S. § 33-801(1); A.R.S. § 33-807. Those statutes do not expressly require that in order to qualify as a "beneficiary" the party foreclosing must also possess the right to enforce the secured obligation. *See id.*

In sum, Vasquez should not be permitted to argue that, on the one hand, Deutsche Bank cannot foreclose because it did not record an assignment prior to noticing the trustee's sale, and on the other hand, Saxon cannot foreclose because it no longer possesses the note. Although such a rule would allow homeowners in default on their loans to remain in their homes without payment, that rule would be highly inequitable and inconsistent with common sense. The Court, however, need not address the issue because the answer to certified question one is "No."

III. Requiring Recordation Of An Assignment Of Deed Of Trust Prior To Notice Of A Trustee's Sale Would Have Enormously Negative Implications For The Lending Industry.

Requiring recordation of an assignment of deed of trust prior to the recording of a notice of trustee's sale would have tremendous policy implications for this State and its business community. Regrettably, much of the United States, and particularly Arizona, is still in the midst of one of the worst real estate recessions in history. Real estate prices in the State have dropped dramatically amid a combined decrease in the demand for real estate and in the supply of funds to purchase real estate. A ruling adverse to Defendants in this case could exacerbate, or at least prolong, the real estate recession in several ways.

First, a holding requiring recordation of assignments would have a severe negative impact on all non-judicial trustee's sales previously conducted and all trustee's deeds previously issued and recorded in Arizona against both commercial

and residential properties. Those sales and deeds could be subject to legal challenge and potentially declared invalid. If those deeds are successfully challenged, any subsequent transfers of those deeds could also be challenged. Moreover, the rights of any lender who provided funds for subsequent purchase of those properties could be challenged. Such litigation would cloud title to thousands of properties, further burden our already overburdened court system, and impair further transfer and development of Arizona real estate. All of this would erode confidence in the non-judicial trustee sale process, chilling investment and lending in real estate at a time when the real estate market is already in dire straits.

Additionally, such a holding could make funding for the purchase of real estate even more scarce than it currently is. Lenders typically require easy access to capital in order to make new loans. Consequently, many lenders now sell their loans on the secondary market. Although the process of selling a loan on the secondary market can be complex and highly dependent on the jurisdiction within which the sales occur, such sales generally involve the same basic steps. First, mortgage loans are purchased from banks and other lenders and assigned to a trust. The trust then assembles the loans in collections, or "pools." The trust then securitizes the pools and issues securities on the secondary market. Secondary market sales, and the liquidity they create, are vitally important to the real estate

market because they ensure a continuing stream of capital to originate new real estate loans and meet demand.

Requiring the recordation of assignments would greatly increase the administrative burden and expense of secondary sales. *See Stockbridge*, 145 B.R. at 811 ("If we were to require assignees to record the mortgage assignment rather than simply possessing the note, mortgage paper would likely become unduly expensive"). Among other expenses, each of the tens of thousands of loans that have been sold on the secondary market would become subject to additional administrative burdens.⁵ The increased expense, at the very least, would result in fewer buyers of notes on the secondary market, and with fewer buyers of notes, originating lenders would be less likely and able to lend. *See id.* ("With fewer buyers in the secondary market, originating lenders would be less likely to lend in the first place"). This decrease in available funds to purchasers of real estate would likely exacerbate the existing real estate recession and stifle economic growth. It certainly would not aid it.

⁵ Moreover, in many cases it may be impossible to record every assignment in the chain of title. Some of the entities in that chain may no longer exist or may simply refuse to cooperate in executing the necessary documents. This point is made, ironically enough, in the recent Draft Report by the Permanent Editorial Board of the Uniform Commercial Code, which Vasquez cites on page 10 of her brief. *See http://extranet.ali.org/directory/files/PEB_Report_on_Mortgage_Notes-Circulation_Draft.pdf* at 9 n.40 ("In many cases, the seller or debtor may no longer be in business. In other cases, it may simply be unresponsive to requests for execution of documents with respect to a transaction in which it no longer has an economic interest").

Worst of all, this additional damage to the already fragile real estate market would come with little or no attendant benefit to consumers. Vasquez and her *amici* suggest that in the absence of recording, lenders will be allowed to hide their identity. Requiring recordation of assignments is not an effective remedy for that purported issue; it is safe to say that most consumers will not begin frequenting county recorder's offices to determine whether their promissory note has been assigned. In fact, "[t]he recording statutes are for the purpose of creating notice to protect against claims of *subsequent purchasers* without notice." *Hardin v. Pioneer Nat. Title Ins.*, 145 Ariz. 83, 85, 699 P.2d 1314, 1316 (App. 1985) (emphasis added). And the Arizona Legislature has already determined that recording an assignment of a deed of trust, at least in some respects, is not sufficient notice even with respect to the trustor of the deed of trust: "The recording of an assignment of the beneficial interest in a trust deed *shall not be deemed notice of such assignment to the trustor* . . . so as to invalidate any payment . . . to the person previously holding the note . . . secured by the trust deed." See A.R.S. § 33-818 (emphasis added). Ultimately, however, to the extent that the lack of notice of assignments to borrowers is an issue in need of a fix, such a fix is the province of the legislature, not the courts. See *Patches v. Indus. Common of Ariz.*, 220 Ariz. 179, 182, 204 P.3d 437, 440 (App. 2009) ("Any extension of the reach of the statute to achieve a desired outcome must be

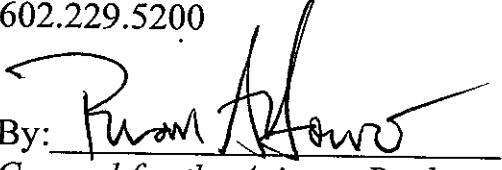
accomplished by the legislature, not the courts").

CONCLUSION

For the legal and policy reasons set forth above, *Amici Curiae* Arizona Bankers Association and the Greater Phoenix Chamber of Commerce respectfully request that the Court answer certified question one in the negative. If, however, the Court answers that question in the affirmative, *Amici Curiae* respectfully request that the Court answer certified question two in the negative.

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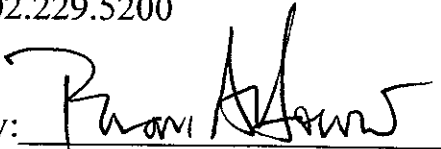
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I, Brian A. Howie, hereby certify that this Brief Of Amici Curiae Arizona Bankers Association And The Greater Phoenix Chamber of Commerce is double-spaced, except for quotations more than two lines long, headings and footnotes, and that the brief uses proportionately spaced Times New Roman typeface of 14 points. According to the word count of the Word software used to prepare this Response, this brief has approximately 5,399 words.

DATED this 19th day of August, 2011.

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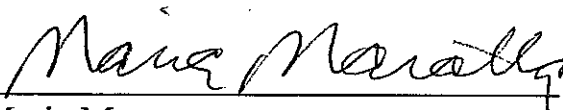
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